

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
APPENDIX**

76-5029

ORIGINAL

United States Court of Appeals FOR THE SECOND CIRCUIT

No. 76-5029

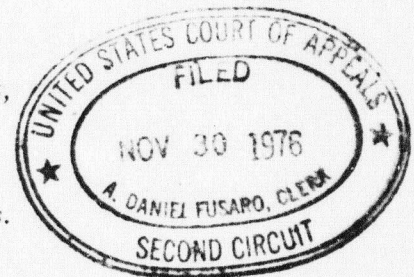
In the Matter
of

INTERSTATE STORES, INC., formerly known as
INTERSTATE DEPARTMENT STORES, INC., *et al.*,
Debtor-Appellees.

DOMINICK'S FINER FOODS, INC.,
Appellant,
and

JOHN E. HANCOCK and AMF INCORPORATED,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



SUPPLEMENTAL JOINT APPENDIX

GOLENBOCK AND BARELL
Attorneys for Appellant,
Dominick's Finer Foods, Inc.
645 Fifth Avenue
New York, New York 10022

SHEA, GOULD, CLIMENKO, KRAMER
& CASEY
Attorneys for Debtor-Appellees,
Trustees of Interstate
330 Madison Avenue
New York, New York 10017

ROGERS, HOGE & HILLS
Attorneys for Appellee,
AMF Incorporated
90 Park Avenue
New York, New York 10016

KRAUSE, HIRSCH & GROSS
Attorneys for Appellee,
John E. Hancock
41 East 42nd Street
New York, New York 10017

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PAGINATION AS IN ORIGINAL COPY

THE ORDER OF BANKRUPTCY JUDGE RYAN DATED 9/14/76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

In re	:	Reorganization
	:	Nos. 74 B 614-802
INTERSTATE STORES, INC., formerly	:	Inclusive
known as INTERSTATE DEPARTMENT	:	
STORES, INC., et al.,	:	
	:	<u>ORDER</u>
Debtors.	:	

-----X

At New York, New York, in said District
on the 14th day of September, 1976

This cause having come on to be heard on September 10, 1976, upon the application of JOSEPH R. CROWLEY and HERBERT B. SIEGEL, Trustees of the debtors herein (the "Trustees"), for an order approving the sale of certain property located at 160 West Joe Orr Road, Chicago Heights, Illinois (the "Property") owned by the debtor Illinois Topps Realty Corp. ("Realty") to John E. Hancock ("Hancock") for a purchase price of \$725,000.00, or such higher or better offer as this Court may accept.

NOW, upon the order to show cause dated August 13, 1976 the application in support thereof, the order of Judge Cannella dated July 19, 1976 relating hereto and the memorandum and order of Judge Cannella dated August 16, 1976 declining to issue a stay of the July 19th order, and all prior proceedings had herein, and upon the hearing held before the undersigned at which hearing Dominick's Finer Foods, Inc. ("Dominick's") appeared and bid,

The Order of Bankruptcy Judge Ryan Dated 9/14/76

and Hancock's assignee, Patrick J. Doyle ("Doyle") appeared and bid, and Doyle having made the best and highest bid of \$1,210,000, and it appearing to the satisfaction of this Court that it is in the best interest of the estate that the sale to Doyle for the price of \$1,210,00 should be approved by this Court, and sufficient cause appearing therefor, it is

NOW, on motion of Shea Gould Climenko & Casey,
attorneys for the Trustees,

ORDERED, that the Trustees, as Trustees of Realty, are hereby authorized to consummate the sale of the Property to Doyle, for a price of \$1,210,000 substantially on the terms and conditions of the agreement dated August 24, 1976 between Hancock and the Trustees, as Trustees of Realty (the "Contract"), a copy of which is annexed to the aforesaid application as Exhibit "A" with such changes as were stipulated in the record, and with such further changes therein, except for any decrease in the price, as said Trustees shall approve; and it is further

ORDERED, that said closing shall occur on September 16, 1976 (or such later date as the parties may agree in writing) at such time and place as Doyle and the Trustees shall agree, notwithstanding the pending appeal by Dominick's of the aforesaid decision of Judge Cannella or anything in the contract to the contrary; and it is further

ORDERED, that all liens and security interests against

The Order of Bankruptcy Judge Ryan Dated 9/14/76

any of the Property (except permitted encumbrances), be and the same hereby are transferred to the proceeds of the sale with the same force and effect as they had when attached to the Property; and it is further

ORDERED, that the Trustees, as Trustees of Realty, be and they hereby are authorized to reject the lease dated May 21, 1961 between Bonobest Development Corporation, the predecessor in interest of Realty and the Decatur Dry Goods Company, predecessor of the debtor Topps of Chicago Heights, Inc.; and it is further

ORDERED, that the Trustees be and they hereby are authorized to take all actions and execute all documents necessary to effectuate the terms of the aforementioned agreement and of the within order.

E. Edward J. Ryan
Bankruptcy Judge

United States of America)
Southern District of New York ss

I, JOHN J. GALLAGHER, Bankruptcy Judge, in and for the said district, do hereby certify that the within instrument is a true and correct copy of the original as the same appears of record in my office.

In Witness Whereof, I hereunto set my hand this 14 day of September, 1976

E. Edward J. Ryan
Bankruptcy Judge
By *Gaelyn H. Hesser*
Clerk

THE TRANSCRIPT OF THE 9/10/76 HEARING
BEFORE BANKRUPTCY JUDGE RYAN

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 (In Bankruptcy)

4 -----x

5 In the Matter :

6 -of- : 74 B 614-802

7 INTERSTATE STORES, INC., et al, :

8 Debtors :

9 -----x

10 United States Courthouse
11 Foley Square
12 New York, N. Y.
13 September 10, 1976

14 B e f o r e :

15 HONORABLE EDWARD J. RYAN, Bankruptcy Judge

16
17 HEARING TO CONSIDER OFFER TO PURCHASE REAL PROPERTY at
18 CHICAGO HEIGHTS, ILLINOIS

19 APPEARANCES:

20 MESSRS. SHEA, GOULD, KRAMER & CASEY
21 Attorneys for Trustees
22 BY: LESTER YASSKY, ESQ.
23 GILBERT ROTKIN, ESQ.
24 PHILIP MANN, ESQ.,
25 Of Counsel

GERALD I. METZ, C.S.R.
OFFICIAL COURT REPORTER

*The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan*

2

APPEARANCES (continued):

MESSRS. COLEMPACH & DARTILL
Attorneys for Dominick's Finer Foods
BY: ARTHUR SILVERMAN, ESQ.
SAM GAICHITZ, ESQ.
NEIL GOTTLINEN, ESQ.,
Of Counsel
645 Fifth Avenue
New York, New York

MESSRS. KRAUSE, HIRSCH & GROSS
Attorneys for John E. Hancock
BY: SHELDON LOWE, ESQ.
Of Counsel
and
JOSEPH SAMET, ESQ.

MERYL WIENER
Attorney for the Securities and
Exchange Commission
26 Federal Plaza
New York, New York

MESSRS. ZALKIN, RODIN & GOODMAN
Attorneys for Institutional Bank Creditors
BY: BURTON ARONSON, ESQ.,
Of Counsel
750 Third Avenue
New York, New York

MR. YASSKY: We have on this morning the latest
episode in the continuing saga of selling
the property in Chicago Heights, Illinois.
I would like to hand up an affidavit of

*The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan*

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1
2 service of the notice of this hearing and
3 sale and also a certificate of publication
4 of the notice of the hearing today and
5 sale.

6 THE COURT: So the notice has been
7 given as required by Judge Cannella; is
8 that correct?

9 MR. YASSKY: Yes, it has.

10 Your Honor is fully familiar with
11 the background of this matter. We have on
12 now for the second time an application of
13 the trustees to sell this property in
14 Chicago Heights. Judge Cannella has remanded
15 the matter to your Honor for further
16 proceedings and we have again noticed a
17 sale to approve a contract to Mr. Hancock
18 for the price of \$725,000 or any higher
19 offers that this Court will entertain.

20 I understand that counsel for
21 Dominick's has requested an adjournment
22 of this matter, and I would defer the
23 application at this time to give him an
24 opportunity to be heard.

25 THE COURT: Surely.

*The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan*

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3 MR. SILVERMAN: Your Honor, on
4 Wednesday of this week our firm sent letters
5 to all parties who have appeared, filed
6 notices of appearance in this matter, stating
7 that this morning we would make application
8 for an adjournment.

9 If your Honor would wish, I would
10 hand up a copy of the letter.

11 THE COURT: It isn't necessary, but
12 if you wish to have it marked as Dominick's
13 Exhibit 1 of today's date, is there any
14 objection to it being received in evidence?

15 MR. YASSKY: No, sir.

16 MR. LOWE: No objection.

17 (Letter marked Dominick's Exhibit 1
18 in evidence.)

19 MR. SILVERMAN: As your Honor knows,
20 Dominick's was the successful bidder the
21 first time around. The approval of the
22 sale of the property to my client,
23 Dominick's, was vacated by Judge Cannella,
24 and my client has taken an appeal to the
25 Second Circuit from Judge Cannella's
order.

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2 The way matters now stand, Judge Cannella
3 has stated in a decision dated August 16, 1976,
4 that "if the Court of Appeals determines
5 that this Court's order should be reversed,
6 it may direct that the sale as confirmed
7 by Judge Ryan on May 24, 1976, be reinstated.
8 The Court, therefore, does not believe
9 that Dominick's will be prejudiced by
10 the lack of a stay or that the consummation
11 of a sale will ^{moot} ~~ruin~~ ^{appeal} the deal."

12 We believe that an adjournment of
13 this proceeding today should be had, to
14 permit the appeal to go forward, because,
15 as things now stand, if the Court of
16 Appeals should reverse Judge Cannella,
17 the prior decision of this Court of
18 May 24, 1976, approving the prior sale,
19 will be reinstated and whomever would be
20 the purchaser today if the sale were to go
21 forward today would be ousted. There is
22 a second problem. In view of this order
23 of Judge Cannella, the order -- contract
24 that has been proposed by Mr. Hancock has
25 no meaning because the contract requires

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1
2 the seller, the trustees, to deliver marketable
3 title.

4 In view of the order of Judge Cannella,
5 there can be no delivery of marketable
6 title until the appeal is determined and
7 only if the appeal is determined adversely
8 to Dominick's.

9 We do not believe that a substantial
10 adjournment would be necessary because the
11 Second Circuit has accelerated the appeal
12 and we received a second order, scheduling
13 order that requires us to file our briefs
14 on September 22nd, the other side to file
15 its brief on October first, and the appeal
16 to be argued during the week of October 12.

17 So that we have but 12 days to get
18 our own briefs and appendix into the Court
19 and the appeal will be, I'm certain,
20 determined relatively soon after October 12
21 in view of the acceleration of the argument
22 and briefing schedule.

23 I think that the main reason for not
24 going forward today, therefore, is to clear
25 the state of title by determining what

1
2 happens on appeal, to prevent a situation
3 from developing where Mr. Hancock's offer
4 is more than just an offer in the breeze,
5 which it is now. He could walk away tomorrow,
6 in view of the status of title at this time,
7 and to let the dust settle and to prevent
8 the trustees from, in effect, getting what
9 will only be a bottle of jelly. He could
10 have a contract approved today which really
11 means nothing to the trustees.

12 THE COURT: Do you wish to be heard,
13 Mr. Yassky?

14 MR. YASSKY: We oppose the application
15 for adjournment.

16 THE COURT: In effect, by granting
17 an adjournment I would be overruling
18 Judge Cannella by, in effect, giving a
19 stay; is that your position?

20 MR. YASSKY: That is certainly the
21 main point.

22 THE COURT: It seems to be self-
23 evident, and I assume -- now, what else?

24 MR. YASSKY: I intended to point
25 that out and I won't reiterate it because

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1
2 the decision starts out by declining to
3 issue the stay.

4 THE COURT: Let me point out that even
5 though you indicated I am fully familiar with
6 this matter, I am familiar with what happened
7 before me and Judge Cannella's first decision.
8 I was not shown a copy of that order on the
9 application for a stay, but if you will,
10 continue.

11 MR. SILVERMAN: Should we mark that
12 as an exhibit, your Honor?

13 THE COURT: No, it isn't necessary,
14 counselor. It's part of the record.

15 MR. YASSKY: I just want to point out
16 several aspects. The estate can be
17 prejudiced here by further delay. They are
18 running costs --

19 THE COURT: I don't think we need go
20 any further than the fact that, in my
21 opinion, legally, if I were to grant an
22 adjournment of this application, in effect
23 I would be overruling Judge Cannella's
24 denial of a stay for whatever reason he
25 stated.

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2 Let me ask you this: is it clear
3 to the trustee that the trustee is of the
4 opinion that if the Court of Appeals shall
5 reverse Judge Cannella, the offer today shall
6 then become ^{most} ~~more~~ and academic?

7 MR. YASSKY: If we have closed before
8 there is a decision --

9 THE COURT: What's your closing date?

10 MR. YASSKY: We would close as soon
11 as practicable after the Court approves
12 the sale today. There is an outside date
13 of December 1, but that was only an
14 outside date for all possible contingencies.

15 THE COURT: I assume the trustee
16 does not expect to close within 48 hours.
17 I doubt he intends to close within a week.
18 I assume the trustee has some target date
19 in mind which has been discussed with
20 Dominick's. Is that so?

21 MR. YASSKY: The contract is now
22 with Hancock, your Honor, and if they are
23 the successful bidders today, we would be
24 prepared to close within a week.

25 THE COURT: All right.

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2 MR. LOWE: If your Honor pleases,
3 my firm represents Hancock, and I join in
4 the trustees' application that the sale
5 proceed today.

6 THE COURT: I have already denied
7 the application for a stay, so I don't see
8 any need to join in the trustees' application
9 that it go forward. I have already said
10 that the sale will go forward.

11 But is there any question that
12 Judge Cannella's statement is the understanding
13 of the parties, that if his decision
14 reversing my order approving the offer o_f
15 Dominick's is reversed, then what goes on
16 here today shall become a nullity?

17 MR. LOWE: I am not quite sure. I
18 don't read Judge Cannella's decision
19 that way.

20 THE COURT: All right, that's the
21 state of the record, gentlemen. Now does
22 anyone else wish to be heard before we
23 inquire whether anybody else wishes to
24 make a higher or better offer.

25 MR. SILVERMAN: Yes, your Honor. I

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11

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2 would like to request that the Court
3 inquire of Mr. Hancock two things. First,
4 who is Mr. Hancock bidding for? And, second,
5 I would appreciate the Court asking
6 Mr. Hancock to represent that he is not
7 acting directly or indirectly for AMF, Inc.,
8 nor does he intend nor has he had
9 discussions to sell the property to AMF, Inc.,
10 or any affiliate or subsidiary thereof.

11 The reason why I make this request,
12 your Honor, is that AMF has entered this
13 proceeding ostensibly as an independent
14 creditor who stands in shoes different from
15 Mr. Hancock and asserts certain positions
16 that Mr. Hancock is not permitted to assert,
17 and I would like to know that Mr. Hancock is
18 not acting in fact for AMF or an affiliate
19 or subsidiary or in connection with AMF.

20 MR. LOWE: I would object to such
21 a request.

22 THE COURT: It's totally irrelevant.

23 MR. LOWE: It's not even relevant.

24 It's wholly inappropriate.

25 THE COURT: I am at a loss to understand

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2 what it has to do with what I have before me.

3 You may remember, at the earlier
4 hearing I characterized the position taken
5 by AMF as being a tool so as to give status
6 on an appeal for the claimed want of proper
7 notice. As I recall Judge Cannella's
8 decision, though, that wasn't discussed
9 at all. So I'm at a loss to understand how
10 AMF's status or lack of status has anything
11 to do with what's before me today.

12 MR. SILVERMAN: I think, your Honor,
13 for purposes of the appeal the record ought
14 to be clear as to what the position of AMF
15 and Mr. Hancock is.

16 THE COURT: Now that clarifies it.
17 I'm not going to use this hearing on an
18 offer as a means of amplifying the record
19 for purposes of the appeal from the order
20 of Judge Cannella. So let's get on with
21 the business at hand.

22 You rise, Mr. Yassky. Do you wish
23 to be heard?

24 MR. YASSKY: Only that it's our
25 application, your Honor.

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Before Bankruptcy Judge Ryan*

13

1
2 THE COURT: Does anybody wish to make
3 a higher or better offer than the offer
4 of John Hancock?

5 MR. SILVERMAN: Yes, your Honor.
6 Dominick's is prepared to make a better
7 offer, and we do so under the following
8 condition: all offers that Dominick's
9 submits this morning are submitted under
10 protest and without waiving any rights
11 on appeal and we do so under a doctrine
12 set forth in the case of Gil-bern Industries,
13 Inc., a First Circuit case appearing at
14 526 Fed. 2d, 267, decided December 4, 1975.
15 That was a situation in which a bidder
16 obtained the property the first time
17 around; he was required to go to a second
18 round of bidding. He obtained the property
19 the second time around. He still perfected
20 his appeal, and the Court held that he
21 was entitled to the lower price.

22 So that we submit all bids and all
23 offers this morning on the understanding
24 that we do it under protest and without
25 waiving any rights on our appeal.

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2 THE COURT: All right, how much do
3 you bid?

4 MR. SILVERMAN: With that understanding,
5 we are prepared to bid the same price on what
6 we consider to be a better offer. The
7 Hancock contract contains several conditions
8 which, if not met by the seller, permits
9 the buyer to walk away. One condition that
10 appears in paragraphs 4.1(b) and 5.1 and 5.2 of
11 the contract is that the seller must
12 deliver marketable title with certain
13 permitted exceptions.

14 My client is prepared to seek no
15 outs based on marketability. We were
16 completely satisfied with the state of
17 title four months ago at the last time
18 that a title report was received. If
19 nothing has happened since that time and
20 if title is delivered to us in the state
21 that it was four months ago, not counting
22 Judge Cannella's order because we would
23 consider that a permitted exception, we
24 would accept title as it then was, it
25 simply being understood that the trustees

1
2 will take care of franchise taxes.

3 In other words, we offer a bid which
4 in this respect is better because we do not
5 seek marketable title and we seek no bids
6 based on marketable title. If the state of
7 title is the same as it was four months ago
8 and the trustee pays the franchise taxes,
9 which he is required to do in any event,
10 we take the title in the state it then
11 was.

12 THE COURT: As you read your report
13 as it was four months ago, would marketable
14 title be able to be delivered?

15 MR. SILVERMAN: No.

16 THE COURT: What would render title
17 unmarketable four months ago?

18 MR. SILVERMAN: There are various
19 restrictions and encumbrances and
20 restrictive covenants and liens. We are
21 prepared to take it in the state that
22 it was --

23 THE COURT: Is Dominick's prepared
24 to take it subject to the state of the
25 title as it appeared -- pardon me. Is Hancock

1
2 prepared to accept it subject to what
3 appears in that title report of four months
4 ago, Mr. Lowe?

5 Off the record.

6 (Discussion off the record)

7 MR. LOWE: May I respectfully request
8 a few moments, your Honor.

9 THE COURT: Certainly.

10 MR. SILVERMAN: We have other things,
11 also.

12 THE COURT: Let's try to get rid of
13 them one at a time.

14 MR. LOWE: May I have a few moments?

15 THE COURT: Will you need a few
16 minutes?

17 MR. LOWE: About five minutes.

18 THE COURT: Off the record.

19 (Discussion off the record)

20 THE COURT: If you will state succinctly
21 what the other phases of your offer are
22 that render it a better offer.

23 MR. SILVERMAN: In paragraphs 4.1(c)
24 and 7.1(d) of the contract, the seller has
25 to deliver certain letters from the

1
2 mortgagee, Massachusetts Mutual Life

3 Insurance Company. We do not know whether
4 the seller can obtain those letters from
5 Massachusetts Mutual if Hancock is the
6 buyer. We do represent to this Court that
7 the seller can have no difficulty in obtaining
8 those letters from Massachusetts Mutual if
9 the buyer is Dominick's. We have been in
10 touch with Massachusetts Mutual.

11 THE COURT: I think that's being
12 frivolous. If necessary, the trustee can
13 subpoena Massachusetts Mutual in here, put
14 them under oath and require that they
15 state the amount of the mortgage. I think
16 that we are bordering on the frivolous
17 with that.

18 What's the third one?

19 MR. SILVERMAN: They would have to
20 consent to the transaction. The contract
21 requires Massachusetts Mutual to consent
22 to this transaction, your Honor. That's
23 stated in the contract. We know that we
24 can get that consent, that the trustees can
25 get it if we are the buyer. We don't know

1
2 that about Mr. Hancock.

3 Thirdly --

4 THE COURT: I thought that was thirdly.

5 MR. SILVERMAN: No. That was second.

6 THE COURT: Your first one was that
7 marketability --

8 MR. SILVERMAN: First was marketability.
9 Second was the letters from the mortgagee.

10 THE COURT: That's a two-pronged
11 approach.

12 MR. SILVERMAN: Yes. Third is that
13 in paragraph 4.1(d) the seller is required
14 to deliver a waiver from a licensee on the
15 property that runs a gas station known as
16 Di-Gas, a waiver that the licensee waives
17 his right to terminate the Di-Gas license
18 agreement and waives his right to require
19 the licensor to purchase the licensee's
20 property. We are prepared to waive paragraph 4.1(d)
21 in its entirety.

22 THE COURT: You would take it, then,
23 subject to the rights of Di-Gas without requiring
24 a waiver from them; is that correct?

25 MR. SILVERMAN: That's correct.

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19

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2 THE COURT: All right. Anything else
3 at the present time?

4 MR. SILVERMAN: In paragraph 23, the
5 closing must occur, in any event, by December
6 first under the agreement with Hancock. We
7 would be prepared to extend that date to
8 January 15th.

9 MR. LOWE: How is that an
10 improvement, your Honor?

11 THE COURT: Please, Mr. Lowe.

12 MR. LOWE: I'm sorry.

13 MR. SILVERMAN: I emphasize, your
14 Honor, that even if we were not to offer
15 these changes in the contract which makes
16 our offer, we believe, a better offer, we
17 believe our offer is better, in any event,
18 because of the problem of there being a
19 cloud on title by virtue of the appeal
20 does not exist were we to win the appeal
21 or lose the appeal. Our client would be
22 in possession of the property, and a
23 transaction would not have to be undone.

24 THE COURT: That's a bootstrap
25 argument, and I will ask you, do you have

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20

1
2 any other phases of your offer that you
3 say are more attractive for the trustees?

4 MR. SILVERMAN: No, your Honor. At
5 this time we would match the price with those
6 conditions.

7 THE COURT: At this time we will
8 give a short adjournment to the trustees to
9 digest what you have said, for Hancock to
10 digest what you have said, and before we
11 take the five-minute adjournment, does any
12 other person here in Court wish to
13 participate in the bidding for the property
14 that's the subject matter of this hearing?

15 A VOICE: Yes, your Honor.

16 THE COURT: You being who, sir?

17 MR. LOWE: May I make just a statement
18 for the record, if counsel will excuse me.

19 If Your Honor pleases, I would
20 respectfully object to the imposition of
21 any conditions at this stage of the hearing
22 or sale. The stay was denied by Judge Cannella
23 on August --

24 THE COURT: What conditions are you
25 talking about? The man argues that he was

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Before Bankruptcy Judge Ryan*

21

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2 invited here to make a higher or, in the
3 alternative, a better offer. He says he has
4 four points. He said five, but the fifth one,
5 I don't even consider. Four points that show
6 that his is a better offer. I suggested to
7 you, you might want five minutes to digest
8 what he says so you can argue to me that
9 it's not a better offer.

10 MR. JONE: All right, your Honor.

11 THE COURT: Now you, sir, did you
12 indicate that you wished to make a further
13 offer?

14 You represent whom, sir?

15 MR. BERNFIELD: My name is Glen Bernfield
16 and I'm from the Chicago law firm of
17 Panter, Nelson and Bernfield, and I
18 represent Mr. Patrick J. Doyle. Mr. Doyle
19 has an assignment of Mr. Hancock's rights
20 under this contract, and we are prepared
21 to bid further in the event it is necessary
22 on behalf of --

23 THE COURT: For Hancock's assignee?

24 MR. BERNFIELD: Right, that's correct,
25 and Mr. Doyle is here in the courtroom, your

*The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan*

22

1
2 Honor.

3 MR. SILVERMAN: Do we have any
4 indication as to Mr. Doyle's financial
5 responsibility?

6 There is an indication in the
7 record, as it stands, considering what
8 went on in May, of Dominick's financial
9 responsibility.

10 MR. LOWE: I think we can deal with
11 that at the appropriate time, your Honor.

12 THE COURT: Yes, we can. I would
13 simply like to hear argument on whether
14 these four suggestions of counsel for
15 Dominick's makes it a better offer.

16 MR. LOWE: May I be heard just
17 one second?

18 THE COURT: Surely.

19 MR. LOWE: You have had a statement
20 from counsel that he is prepared to bid
21 more than \$725,000.

22 THE COURT: He is playing his cards
23 one at a time. He doesn't want to show the
24 whole hand at once. He can't be criticized
25 for that.

*The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan*

23

1
2 MR. LOWE: If we get a better dollar
3 offer, does it make any sense to go into the
4 conditions?

5 THE COURT: I don't hear a better
6 dollar offer. I hear what he says is a
7 better offer. I would like to hear from the
8 trustee and from you whether you agree it's
9 a better offer, and if you don't think
10 it's a better offer, tell me why.

11 MR. LOWE: We will have a better dollar
12 offer, your Honor.

13 THE COURT: Do you want to make a
14 better dollar offer now?

15 MR. LOWE: Do I understand that you
16 don't intend to put in any better or higher
17 dollar bid?

18 MR. SILVERMAN: That is an incorrect
19 understanding.

20 THE COURT: It is implicit from what
21 has been said so far this morning. I want
22 to hear arguments and I will make a
23 decision now on the question whether counsel
24 for Dominick's has just made a better offer.

25 MR. LOWE: Thank you.

*The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan*

24

(A recess was taken)

(Hearing resumed at 10:25 a.m.)

MR. YASKEY: The trustee wishes to advise the Court that in our judgment the offer of Dominick's to purchase at the same price as the Hancock contract is a better offer from the estate's standpoint, primarily for the reason of the waiver of the Di-Gas matter. There is a potential claim against the estate if Di-Gas would choose to exercise its rights under its license and that is a value, if not presently ascertainable. Certainly in the trustee's judgment he has considered it a value and would make the offer better than certainly a similar offer at another price.

MR. LOWE: Before deferring to counsel for the assignee, I think it incumbent upon me to bring to the attention of the trustee --

THE COURT: Who is going to speak for the person who is bidding against Dominick's, you or the other gentleman?

MR. LOWE: The other gentleman.

*The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan*

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2 THE COURT: You speak for whom, then?

3 MR. LOWE: I do speak for Mr. Hancock
4 and I think I have a statement that I would
5 like to make on his behalf.

6 THE COURT: Mr. Hancock has assigned
7 his rights to this gentleman's client.

8 MR. LOWE: That is correct.

9 THE COURT: Those are the two parties
10 in interest.

11 MR. YASSKY: We would want to make
12 one point on the same assignment question
13 because it's germane to what your Honor
14 has just been speaking to.

15 THE COURT: We don't come to that,
16 though, unless they are able to persuade
17 me that the Dominick's offer is not a better
18 offer.

19 MR. YASSKY: All right.

20 MR. LOWE: I will defer to counsel for
21 the assignee.

22 THE COURT: Are you prepared to meet
23 Dominick's terms?

24 MR. BERNFIELD: Yes we are, your
25 Honor. In the sense that the trustee and

*The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan*

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2 Mr. Yassky have indicated that the waiver
3 of the Di-Gas condition is a better offer,
4 we are prepared to waive that particular
5 condition.

6 THE COURT: Do you also waive the
7 condition of marketability?

8 MR. BERNFIELD: Yes.

9 THE COURT: And are you prepared to
10 accept the title as it existed at the time
11 that Dominick's had their title search
12 four months ago?

13 MR. BERNFIELD: What was that date?
14 If I'm aware of that date.

15 As a matter of fact, we are prepared
16 to accept the title as it existed on May 5, 1976,
17 which is the date of the title report which --

18 THE COURT: You reserved anything
19 that took place in the intervening period.

20 MR. SILVERMAN: Except one thing which
21 we didn't reserve and we are prepared to
22 waive that effect on marketability. We
23 would not assert as an effect on marketability,
24 as destroying marketability, the pendency
25 of the appeal or the order of Judge Cannella.

The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan

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2 THE COURT: Yes, and I say that's
3 a bootstrap and that is not even to be
4 given consideration at the present time.

5 MR. SILVERMAN: May I just be heard
6 on that point.

7 As matters now stand, if there were
8 to be a closing with Mr. Hancock set up,
9 ~~we~~ ^{he} could assert the Judge Cannella order
10 as saying there can be no marketability and
11 walk away.

12 MR. YASSKY: The trustees would insist
13 on that waiver.

14 THE COURT: I assume that's implicit.

15 MR. YASSKY: I would like it to be
16 explicit on the record that Hancock would
17 not assert the pending appeal as a cloud
18 on the title.

19 MR. BERNFIELD: So long as there is
20 no stay, I think that's acceptable.

21 MR. YASSKY: With the present state
22 of the record.

23 MR. BERNFIELD: As the record now
24 stands, yes.

25 THE COURT: What about obtaining consent

*The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan*

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2 of Massachusetts Mutual?

3 MR. FERNFIELD: We have no objection to
4 that, your Honor.

5 We will waive that requirement. I
6 think Massachusetts Mutual must consent.

7 THE COURT: Even if they don't, you
8 are prepared to go forward without their
9 consent?

10 MR. FERNFIELD: Yes.

11 THE COURT: We now have a Mexican
12 standoff.

13 MR. SILVERMAN: Your Honor, on this
14 question of title, I would just like to ask
15 whether Mr. Doyle said he would waive the
16 pendency of the appeal as a condition? Is
17 he prepared to say that he would close
18 tomorrow or next week or the week after
19 and pay the \$725,000 and if the sale were
20 set aside in the Court of Appeals, he gets
21 nothing back? Because he took the state
22 of title that existed and waived the pendency
23 of the appeal as a condition.

24 THE COURT: Are you telling me if
25 Dominick's prevails on the appeal, they

*The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan*

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2 are not going to go forward at their --

3 MR. SILVERMAN: Dominick's, of course,
4 will go forward. Dominick's will certainly
5 go forward. The question is whether
6 Mr. Doyle would be prepared to say that
7 he is willing to pay \$725,000 for the right
8 to perhaps remain in possession for a month
9 and a half. That's what he's saying.

10 THE COURT: That is of no concern
11 to Dominick's. That's of concern to the
12 trustees.

13 All right, so we have a standoff, then,
14 gentlemen.

15 Does anybody wish to make a higher
16 or better offer?

17 MR. LOWE: May I be heard at this
18 point? I would like to be heard.

19 THE COURT: I don't think it's fair
20 to have two attorneys acting for the one
21 interest, but go right ahead, Mr. Lowe.

22 MR. LOWE: If your Honor please,
23 I would like to make a statement to the
24 Court that I think should be brought to the
25 attention of the Court and the trustee.

*The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan*

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2 I am informed by Mr. Hancock that
3 three weeks ago he was approached indirectly
4 by a representative of Dominick's and
5 requested not to make any higher offer to
6 this Court for the one that was submitted.

7 THE COURT: What does this have to
8 do with anything that I have before me?

9 MR. LOWE: I think it places this
10 hearing in the appropriate context, your
11 Honor.

12 THE COURT: Are we supposed to conduct
13 a grand jury investigation, or have a
14 simple commercial matter proceed as it
15 ought proceed?

16 As I understand it, then, we have
17 Dominick's counter-offer, which was better
18 than the original offer of the assignee
19 of Hancock. Hancock has met the Dominick's
20 offer. Do you wish to make a higher or
21 better offer?

22 MR. SILVERMAN: \$730,000, on those
23 terms.

24 MR. BERNFIELD: We would request that
25 in view of the magnitude of the sale here, that

*The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan*

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the increments be increments of \$25,000.

THE COURT: No. They will be \$10,000.

MR. BENFIELD: I take it there is
still Mr. Hancock's contract of \$725,000.

THE COURT: \$730,000 has been bid.
You may increase it in increments of
\$10,000 if you wish.

MR. BENFIELD: Mr. Doyle will be
doing the bidding on this.

MR. DOYLE: \$740,000.

MR. SILVERMAN: \$750,000.

MR. DOYLE: \$760,000.

MR. SILVERMAN: \$770,000.

MR. DOYLE: \$780,000.

MR. SILVERMAN: \$790,000.

MR. DOYLE: \$800,000.

MR. SILVERMAN: \$810,000.

MR. DOYLE: \$820,000.

MR. SILVERMAN: \$830,000.

MR. DOYLE: \$840,000.

MR. SILVERMAN: \$850,000.

MR. DOYLE: \$860,000.

MR. SILVERMAN: \$870,000.

MR. DOYLE: \$880,000.

*The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan*

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MR. SILVERMAN: \$890,000.

MR. DOYLE: \$900,000.

MR. SILVERMAN: \$910,000.

MR. DOYLE: \$920,000.

MR. SILVERMAN: \$930,000.

MR. DOYLE: \$940,000.

MR. SILVERMAN: \$950,000.

MR. DOYLE: \$960,000.

MR. SILVERMAN: \$970,000.

MR. DOYLE: \$980,000.

MR. SILVERMAN: \$990,000.

MR. DOYLE: \$1 million.

MR. SILVERMAN: \$1,010,000.

MR. DOYLE: \$1,020,000.

MR. SILVERMAN: \$1,030,000.

MR. DOYLE: \$1,040,000.

MR. SILVERMAN: \$1,050,000.

MR. DOYLE: \$1,060,000.

MR. SILVERMAN: \$1,070,000.

MR. DOYLE: \$1,080,000.

MR. SILVERMAN: \$1,090,000.

MR. DOYLE: \$1.1 million.

MR. SILVERMAN: Your Honor, at this

point could we have some indication as to

*The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan*

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2 the bidder's financial responsibility,
3 Mr. Doyle's financial responsibility.

4 THE COURT: Does the trustee ask for
5 some evidence of that?

6 MR. YASSKY: He would like some
7 indication of that because with the bidding
8 being --

9 THE COURT: I would point out that I
10 have highly spirited bidding. It hardly
11 seems the appropriate time to let things
12 cool down. You have got \$1.1 million. I
13 don't think we can do a D&B on the man in
14 five minutes.

15 MR. YASSKY: One of the terms in
16 the notice was the ten percent down.

17 MR. DOYLE: I have certified checks
18 for \$150,000.

19 THE REPORTER: May I have your full
20 name.

21 MR. DOYLE: Patrick John Michael Doyle.

22 THE COURT: \$1.1 million.

23 MR. SILVERMAN: \$1.15 million.

24 MR. DOYLE: \$1,160,000.

25 MR. SILVERMAN: \$1,170,000.

*The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan*

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2 MR. DOYLE: \$1,180,000.

3 MR. SILVERMAN: \$1,190,000.

4 MR. DOYLE: \$2 million -- no. \$1.2 million,
5 your Honor.

6 MR. SILVERMAN: We match \$1.2 million.
7 We don't exceed that, and we state that
8 the offer at \$1.2 million is a better
9 offer because of the likelihood of the
10 proceeding being brought to a final close
11 and nobody being ousted of possession and
12 the transaction not being undone.

13 MR. DOYLE: Your Honor --

14 THE COURT: Please, Mr. Doyle.

15 MR. YASSKY: Can I ask a question.

16 Does that mean that the preservation
17 of the rights on appeal are now being
18 waived?

19 MR. SILVERMAN: NO.

20 THE COURT: No.

21 I think that the final highest bid
22 was made by Mr. Doyle, \$1.2 million.

23 MR. SILVERMAN: Your Honor, may I
24 inquire why the equal bid of Dominick's
25 would not be inherently a better bid?

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*The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan*

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2 MR. BERNFIELD: I think that would
3 be mute --

4 THE COURT: To me it is self-evident.
5 We have bidding that went up to \$1.2 million.
6 You don't better it. He made the last offer.
7 By just repeating his offer, you don't
8 better it. He bid \$1.2 million on the
9 amendment to the conditions as were spelled
10 out by you. He made the final high bid of
11 \$1.2 million.

12 MR. SILVERMAN: We believe, your
13 Honor, that if we match that bid, it's not
14 a higher bid, but it is a better bid. It is
15 inherently better for the trustees to
16 accept the same bid of Dominick's because
17 of problems which obviously are obviated
18 that do exist if the offer of Hancock were
19 accepted at the same price.

20 MR. YASSKY: Your Honor, if I could
21 point out to the Court --

22 THE COURT: Just a minute. I think
23 we are now up in the realm of philosophy.
24 As I understand counsel's argument, it's
25 a better offer because even though dollar-wise

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*The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan*

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2 it's the same, it releases the estate
3 of the potentiality that there might be
4 a reversal by the Court of Appeals.

5 MR. YASSKY: I would argue just --

6 THE COURT: No. I just state that this
7 is what I understood to be his argument. I'm
8 not giving a decision on it.

9 MR. BERNFIELD: Is that Dominick's
10 final offer?

11 MR. SILVERMAN: Yes.

12 MR. BERNFIELD: We understand that
13 you have accepted our offer as being the
14 final offer, as being the higher offer.

15 THE COURT: Yes.

16 MR. BERNFIELD: In the event there
17 is any problem with that, we would be
18 prepared to go to \$1,210,000. However,
19 if that is not necessary, we will accept
20 the higher offer, \$1.2 million.

21 THE COURT: You continue the bid
22 of \$1.2 million?

23 MR. BERNFIELD: Pardon me?

24 THE COURT: Your final bid is \$1.2 million?

25 MR. DOVIT: \$1.21, unconditional,

1
2 \$1,210,000.

3 MR. SILVERMAN: We stay at \$1.2 million,
4 saying that it's a better offer.

5 MR. YASSKY: Considering the large
6 amounts involved, your Honor, if we could
7 just take two minutes of your Honor's
8 time and stipulate on the record the
9 conditions as I understand them, and that
10 is that --

11 THE COURT: Off the record.

12 (Discussion off the record.)

13 THE COURT: I hold that the offer
14 of Dominick's at \$1.2 million is not a
15 better offer than the \$1.21 million. I
16 reject Dominick's argument that it is a
17 better offer, because if Dominick's offer
18 is accepted, that will obviate any of the
19 problems that inhere in the pendency of
20 the appeal in the Second Circuit.

21 Now, Mr. Yassky, if you want to
22 summarize for the record what the trustees
23 understand are the conditions under which
24 Mr. Doyle's interests are offering \$1.21 million.

25 MR. YASSKY: Yes. We would like

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2 Mr. Doyle to stipulate to the following:
3 the contract is with Mr. Hancock and provides
4 that there shall be no assignment unless
5 a duplicate original containing an assumption
6 by the assignee is delivered to the seller.
7 We have never received that. But we will be
8 willing to accept the representation on the
9 record that there is an assumption of the
10 contract as it stands with, of course, the
11 higher price that's accepted.

12 MR. BERNFIELD: Yes. We have an
13 assignment that Mr. Hancock does assume
14 and which Mr. Doyle has accepted and I will
15 deliver it. I believe the contract calls
16 for duplicates and here they are. Let me
17 make certain.

18 MR. YASSKY: It is also understood
19 that Mr. Doyle will waive the condition
20 with respect to Di-Gas.

21 MR. BERNFIELD: Yes.

22 MR. YASSKY: It is also understood
23 that Mr. Doyle accepts the title report
24 as then delivered to you in May with the
25 exceptions noted thereon.

*The Transcript of the 9/10/76 Hearing
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2 MR. BERNFIELD: Yes, except with the
3 exception of the lease provision, for
4 which we have an order that will be entered
5 today that rejects that 1961 lease.

6 MR. VASSKY: That's acceptable.

7 It is also understood that you will
8 not assert as a cloud on the title, and
9 you accept the title to be marketable,
10 notwithstanding the present status of the
11 appeal by Dominick's of the order of
12 Judge Cannella?

13 MR. BERNFIELD: Yes.

14 THE COURT: Off the record.

15 (Discussion off the record.)

16 MR. VASSKY: It is understood that
17 Mr. Doyle will waive the condition with
18 respect to Massachusetts Mutual that
19 Massachusetts Mutual is required to
20 consent to the transaction?

21 MR. BERNFIELD: Yes.

22 MR. VASSKY: It is also understood
23 that a further down-payment will be delivered
24 to the trustees this morning.

25 MR. BERNFIELD: Yes.

*The Transcript of the 9/10/76 Hearing
Before Bankruptcy Judge Ryan*

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3 MR. YASSKY: In the amount of 10 percent
4 of the cash amount of the purchase price.

5 MR. PERFIELD: Right.

6 THE COURT: Does that wrap it up?

7 MR. YASSKY: That wraps it up.

8 THE COURT: All right, gentlemen,
9 you may submit an appropriate order.

10 Incidentally, does the Commission
11 wish to express anything on this, Ms. Wiener?

12 MS. WIENER: No.

13 MR. PERFIELD: We would like to
14 submit an order this morning. We would like
15 to have Mr. Yassky look at it first, but
16 we can expedite the closing if we can have
17 an order entered immediately.

18 MR. MANN: We have to give two days'
19 notice to Judge Cannella under the order
20 of reference for orders of this nature.
21 So I'm afraid we cannot expedite it all
22 that much.

23 MR. YASSKY: We will look at it.

24 (The matter was closed)
25

THE ORDER TO SHOW CAUSE AND AFFIDAVIT SUBMITTED BY
DOMINICK'S IN SUPPORT OF A MOTION FOR A STAY
PENDING APPEAL, DATED 8/13/76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
In re

INTERSTATE STORES, INC., formerly
known as INTERSTATE DEPARTMENT STORES,
INC., et al.,

Reorganization
Nos. 74B 614-802
Inclusive

Debtors.

ORDER TO SHOW CAUSE

-----x
Upon the annexed affidavit of Arthur C. Silverman,
sworn to August 12, 1976, with annexed exhibits and all the
proceedings had herein;

LET John E. Hancock, AMF Inc. and Joseph R. Crowley
and Herbert B. Siegel as Trustees of Illinois Topps Realty
Corp., or their attorneys, show cause before this Court at
Room of the United States Courthouse, Foley Square, New
York, New York, on August , 1976 at or as soon thereafter
as counsel may be heard, why an order should not be entered
pursuant to Federal Rules of Appellate Procedure 8: staying
the order of this Court of July 20, 1976 vacating the May
24, 1976 order of Bankruptcy Judge Ryan authorizing the said
Trustees to consummate the sale of certain real property
located in Chicago Heights, Illinois, or in the alternative,
enjoining the said Trustees from entering into any transaction
to dispose of the aforesaid real property, pending prompt
prosecution of the appeal by Dominick's Finer Food, Inc. to

*The Order to Show Cause and Affidavit Submitted by
Dominick's in Support of a Motion for a Stay
Pending Appeal, Dated 8/13/76*

the Court of Appeals for the Second Circuit and for such other and further relief as this Court deems just and proper, and it is further

ORDERED, that pending the hearing of this motion, the Trustees shall take no steps in furtherance of any transaction to dispose of the subject real property.

Service of a copy of this order and the papers upon which it was granted shall be sufficient if made personally upon the attorneys for the Trustees on or before August , 1976, and if made by mail on or before August , 1976 upon the attorneys who have received notice of the various proceedings heretofore had herein.

*The Order to Show Cause and Affidavit Submitted by
Dominick's in Support of a Motion for a Stay
Pending Appeal, Dated 8/13/76*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

Reorganization
Nos. 74B 614-802
Inclusive

In re

INTERSTATE STORES, INC., formerly
known as INTERSTATE DEPARTMENT STORES,
INC., et al.,

AFFIDAVIT IN SUPPORT
OF MOTION FOR A STAY
PENDING APPEAL

Debtors.

-----X

State of New York)
 ss.:
County of New York)

Arthur C. Silverman, being duly sworn, deposes and
says:

1. I am a member of the firm of Golenbock and
Barell, attorneys for Dominick's Finer Foods, Inc. ("Dominick's")
which has appealed to the Court of Appeals for the Second
Circuit from this Court's order of July 20, 1976 vacating
two orders of Bankruptcy Judge Ryan. Judge Ryan's first
order, signed May 24, 1976 authorized the consummation of the
sale of certain real property located in Chicago Heights,
Illinois (the "Property") by Illinois Topps Realty Corp. to
Dominick's pursuant to a contract previously authorized
by the Bankruptcy Court on May 17. Judge Ryan's second order,
was orally issued on June 28, 1976, after evidentiary hearing,
and denied a motion brought by AMF, Inc. (a creditor) and
John E. Hancock (a bidder for the property) to vacate and
set aside the prior May 24 order.

*The Order to Show Cause and Affidavit Submitted by
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Pending Appeal, Dated 8/13/76*

2. I submit this affidavit in support of Dominick's motion pursuant to Rule 8 of the Federal Rules of Appellate Procedure: to enjoin the Trustees from entering into any transaction to sell the Property, or, in the alternative, to stay this Court's vacatur order, filed July 20, 1976, pending appeal as of right by Dominick's from said vacatur order pursuant to Section 24 of the Bankruptcy Act (11 U.S.C. §47).

3. This motion is brought on by order to show cause because an interim stay pending hearing of this motion is being sought. On August 11, I was informed by Lester Yassky, Esq. of the law firm representing the Trustees that it is his intention to immediately execute (either today or early next week) a contract to sell the Property to Hancock for \$725,000 subject to Bankruptcy Court approval. As will be made clear below, if the interim relief and the relief pending appeal are not granted, Dominick's will be irreparably harmed, will have no alternative relief, and its appeal will be rendered moot. In contrast if said relief is granted, neither Hancock nor the Trustees nor the creditors will suffer any substantial harm if Dominick's is permitted to pursue diligently and expeditiously its right of appeal -- an appeal which we believe raises for the first time in a Court of Appeals important questions concerning: (i) the nature and scope of notices of hearing for the sale of

*The Order to Show Cause and Affidavit Submitted by
Dominick's in Support of a Motion for a Stay
Pending Appeal, Dated 8/13/76*

property under the recently promulgated Chapter X Bankruptcy Rules, and (ii) the discretion of the Bankruptcy Judge in approving notices addressed to a limited class of recipients. These issues are of paramount importance in the day-to-day administration of the estates of debtors and bankrupts.

4. A notice of appeal to the Court of Appeals for the Second Circuit was filed by Dominick's on August 12, 1976, and a copy thereof is annexed hereto as Exhibit A.

5. The need for relief pending appeal is obvious and Dominick's will be severely prejudiced unless such relief is immediately granted, for if a contract is signed by the Trustees and Hancock, Dominick's will be compelled either to abandon any interest in the property or to better Hancock's offer. In either event the appeal would become moot and Dominick's would thus forfeit the right of appeal and all its rights under the prior contract between Dominick's and the Trustees. Similarly, in either event, Dominick's will be irreparably harmed, for it must choose between giving up all rights to the Property and giving up for all time (without recourse against anyone) the advantageous terms set forth in the contract between Dominick's and the Trustees. One obvious benefit to Dominick's is the \$685,000 price which is \$40,000 less than the \$725,000 bid of Hancock. In short, if relief is not granted and the appeal is permitted

*The Order to Show Cause and Affidavit Submitted by
Dominick's in Support of a Motion for a Stay
Pending Appeal, Dated 8/13/76*

to proceed, Dominick's must necessarily lose the fruits of its good faith contract with the Trustees. See generally 6 Moores Federal Practice, ¶ 57.13 (2d ed. 1966).

6. It is submitted that Dominick's has a meritorious appeal which it should be permitted to prosecute. This Court, in vacating Judge Ryan's order, suggested that on remand: (1) the Trustees' Notice of Hearing, issued pursuant to Bankruptcy Rule 10-607, indicate that alternative offers will be entertained on or before the return date, and (2) pursuant to Bankruptcy Rule 10-209(b)(4), that 20 days' notice of proposed sales of property be given to creditors, stockholders, indenture trustees, and others, except to the extent that the Trustee can show cause why such notice is not required. Indeed the Court suggested that advertising in national newspapers might be required.

(a) The Appeal raises the important question as to the amount of discretion which a Bankruptcy Judge may exercise under Bankruptcy Rules 10-607 and 10-209(b)(4). Although this Court clearly disagrees with the Bankruptcy Judge, there has to date been no definitive authority, case law or statutory, compelling the Bankruptcy Judge to exercise its discretion in a manner apparently required by this Court.

(b) The evidence strongly demonstrates, in

*The Order to Show Cause and Affidavit Submitted by
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Pending Appeal, Dated 8/13/76*

the view of Dominick's, that Judge Ryan exercised his discretion properly, carefully, and judiciously, and that his interpretation of the governing Bankruptcy Rules was eminently reasonable, especially in light of the following facts:

i) there was no complaint by Hancock, the Securities and Exchange Commission, the Unofficial Creditors' Committee or the Senior Institutional Lenders as to the number of creditors who received notice of the hearing or the sufficiency of the notice. The only objectant-- who belatedly entered the scene--was a single creditor who, stood to gain only \$40.00 (three one hundredths of one cent per dollar of claim) from Hancock's untimely offer.

ii) Hancock was advised several times prior to and at the May 17th hearing that another party intended to appear and respond to the Hancock offer with a higher price.

iii) the sale involved only 0.4 percent of the Debtor's total assets.

iv) The Trustees had demonstrated the required good cause for the shortened period of notice and limited class of recipients ordered by Judge Ryan. The cause shown for shortening the twenty day period was the conditional sales contract between the Trustees and Hancock

*The Order to Show Cause and Affidavit Submitted by
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Pending Appeal, Dated 8/13/76*

which required an accelerated notice period. Relatedly, that contract also provided that in any event the sale had to be completed by June 1. In short it would have been impossible to comply with both the contract time deadline and the twenty day provision of Bankruptcy Rule 10-209(b). Moreover, the cause for limiting the class was made clear, i.e. that the Trustees should not be burdened with sending notice to 9,000 creditors and 7,700 stockholders where the sale of only 0.4% of the debtor's assets was involved.

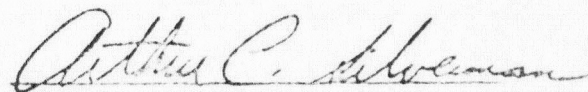
(c) Judge Ryan after conducting two hearings and carefully sifting Hancock's claim, concluded that "To set aside this sale would work a travesty of justice in my opinion. Entirely adequate and prior notice was given. . . . It would work a gross injustice to Domonick's if this sale were to be set aside." June 28, 1976 Tr. at 69-70, quoted in J. Canella's July 19, 1975 opinion at 5-6. (Exhibit B). Surely such a carefully arrived at conclusion must be accorded sufficient significance to warrant a stay so that the Court of Appeals may be allowed to decide issues of critical importance to the daily administration and disposition of estates in bankruptcy.

7. This Court, of course, has the power to grant a stay of its own order pending the determination of an appeal therefrom. See, e.g., Ivor B. Clark Co. v. Hogan,

*The Order to Show Cause and Affidavit Submitted by
Dominick's in Support of a Motion for a Stay
Pending Appeal, Dated 8/13/76*

296 F. Supp. 407 (S.D.N.Y. 1969). Indeed the Court should grant such a stay where a denial would render the appeal subject to dismissal on grounds of mootness and where equitable considerations such as irreparable harm to Dominick's and the merits of Dominick's appeal weigh heavily in Hancock's favor. See, In re Penn Central Transportation Company, 346 F. Supp. 1333, 1334 (E.D. Pa. 1972); cf. Pugach v. Dollinger, 275 F.2d 503, 507 (2d Cir. 1960) (Waterman, J., concurring); Taylor v. Board of Ed. of City Sch. Dist. of New Rochelle, 195 F. Supp. 231 (S.D.N.Y. 1961), aff'd, 294 F.2d 36 (2d Cir.), cert denied, 368 U.S. 940 (1961).

8. Dominick's has made no prior application for a motion to stay this Court's order.



Arthur C. Silverman

Sworn to before me
this 13th day of Aug., 1976



RONALD S. KATZ
Notary Public, State of New York
No. 60-463235
Qualified in Westchester County
Term Expires March 30, 1978

641a

TELEGRAM DATED 5/17/76 FROM JOHN E. HANCOCK TO JUDGE RYAN

FILE
MAY 18 1976
U.S. DISTRICT COURT
N.D. ILL.

NYA141(2151)(2-069877E138)PD 05/17/76 2151

ICS IPMBNGZ CSP

3123253622 TDBN HINSDALE IL 82 05-17 0951P EST

FMS HONORABLE EDWARD J RYAN, DLR BY 8:30 AM, DLR

BANKRUPTCY JUDGE ROOM 230

FILED

MAY 18 1976

22
EDWARD J. RYAN
BANKRUPTCY JUDGE

UNITED STATES COURTHOUSE FOLEY SQ

NEW YORK NY

REGARDING INTERSTATE STORES INC 74B614-802 INCLUSIVE. JOHN HANCOCK
WISHES TO INCREASE HIS OFFER TO PURCHASE THE PROPERTY AT 150 WEST

JOE ORR ROAD CHICAGO HEIGHTS FROM THE TRUSTEES OF ILLINOIS TOPPS

REALTY CORP TO \$725,000 UPON THE SAME TERMS AND CONDITIONS AS

CONTAINED IN THE PREVIOUS AGREEMENT AND ASKS THAT THE COURT ORDER OF

MAY 17 1976 APPROVING THE OFFER OF SALE BE VACATED AND THE COURT

CONSIDER THE INCREASED OFFER OF JOHN HANCOCK

JOHN HANCOCK CARE JOHN M KAVENY 11 SOUTH LASALLE ST CHICAGO

CF-1201 (7-5-59)

APPENDIX

Submitted this 30TH day of NOVEMBER 1976

.....
 Hon. David Thompson Party

Attorneys for ~~DEISTON~~ - APPELLEAS
TRUSTEES OF INTRANSITIVE

COPY REC'D.

KLAUSE MIRSCH & GROSS

Adm. Serv. Div.



Date ATTORNEY FOR APPELLER HANCOCK

August David Wells 2nd Jan 2006
ATTORNEYS FOR APPELLANT AAF INC.